

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re

BRAC GROUP, INC. (f/k/a Budget Group, Inc.),
et al.

Debtors.

Chapter 11

Case No. 02-12152 (MFW)

(Jointly Administered)

BRAC GROUP, INC. (f/k/a Budget Group, Inc.),
et al.,

Plaintiffs and Counterclaim Defendants,

v.

Jaeban (U.K.) Limited,

Defendant and Counterclaim Plaintiff.

03-A-54271

**PLAINTIFFS' RENEWED MOTION TO STRIKE JAEBAN UK'S ANSWER AND
AFFIRMATIVE DEFENSES AND FOR ENTRY OF A DEFAULT JUDGMENT**

Plaintiffs, including Debtor Budget Rent-A-Car International, Inc. ("BRACII"), by their undersigned attorneys, hereby respectfully renew their request that the Court strike the Answer and Affirmative Defenses of Defendant Jaeban (U.K.) Limited ("Jaeban UK") due to its persistent failure to obtain Delaware counsel. The failure to obtain counsel means that it is no longer able to defend BRACII's claims in this proceeding; a default judgment should be entered. In support of their Motion, Plaintiffs state as follows:

1. On May 25, 2004, this Court upheld the assignment of Jaeban UK's counterclaims to I.M. Jaeban.¹ The Court noted, however, that Mr. Jaeban "has not assumed

¹ As of the filing of this Motion, BRACII's Motion for Partial Reconsideration, directed to the enforceability of the anti-assignment clauses, remains pending.

Jaeban's liability to BRAC[II]." Mem. Opp. 7. Jaeban UK remains unrepresented as a defendant to BRACII's claims and has given no indication that it will retain Delaware counsel.

2. It is axiomatic that a corporation can only participate in litigation through counsel. *E.g., Rowland v. California Men's Colony*, 506 U.S. 194, 203 (1993) (citing cases). Jaeban UK has lacked U.S. counsel since January 12, 2004, when its prior counsel withdrew. Jaeban UK's failure to obtain counsel violated both this Court's order in open court following the withdrawal of its prior counsel and the requirements of Rules 83.5(d) and Rule 83.5(e) of the District of Delaware Local Rules (which apply in this Court under Bankr. D. Del. R. 9010-1(a)).

3. An unwillingness to retain counsel also constitutes a failure to "defend" under Fed. Bankr. R. 7055 (which incorporates Fed. R. Civ. P. 54(a)). *Shapiro, Bernstein & Co. v. Continental Record Co.*, 386 F.2d 426, 427 (2d Cir. 1967). *See, e.g., Hoxworth v. Blinder, Robinson & Co.*, 980 F.2d 912, 919 (3d Cir. 1992) (citing *Shapiro, Bernstein* in holding that failure to retain substitute counsel was one of several acts that constituted a default); *Eagle Assoc. v. Bank of Montreal*, 926 F.2d 1305, 1309 (2d Cir. 1991).

4. Because Jaeban UK cannot proceed in this action without counsel, "a claim against it cannot be brought to trial." *Transportes Aereos de Angola v. Ronair, Inc.*, 104 F.R.D. 482, 506 (D. Del. 1985). Entry of a default judgment is therefore appropriate. *Id.* *See, e.g., In re Courtesy Inns, Ltd.*, 40 F.3d 1084, 1089-90 (10th Cir. 1994) (failure to retain counsel in violation of local rules sufficient to justify default); *Eagle Assocs. v. Bank of Montreal, supra*; *Albert v. Wesley Health Servs, Inc.*, 2001 U.S. Dist. LEXIS 8589 (D. Kan. Mar. 8, 2001) (Magistrate Judge recommendation; recommendation accepted at 2001 U.S. Dist. LEXIS 6119 (D. Kan. May 10, 2001)).²

² In *Hoxworth*, the defendants ultimately obtained new counsel, and the Third Circuit evaluated the sanction of dismissal under the *Poulis* factors. *See Poulis v. State Farm Fire & Cas. Co.*, 747 F.2d 863 (3d Cir. 1984).

5. The assignment of Jaeban UK's counterclaims prior to the entry of a default judgment on BRACII's claims as plaintiff is *not* an impediment to entry of a default judgment against Jaeban UK. This is precisely what occurred in *DVI Financial Services, Inc. v. Florida Heart, LLC*, 2002 US Dist. LEXIS 16296 (E.D. Pa. 2002), where the assignors, like Jaeban UK, were financially troubled.

5. By the time the Court considers this Motion, BRACII will have filed its Amended Complaint (which adds a claim against Mr. Jaeban under his Personal Guarantee) and Mr. Jaeban, as purported assignee of Jaeban UK's counterclaims, will have amended Jaeban UK's counterclaims against BRACII that were purportedly assigned to him. BRACII reserves its rights to renew or amend this Motion as appropriate and asserts that Mr. Jaeban has no right to answer or otherwise respond to Plaintiffs' allegations against Jaeban UK or raise affirmative defenses on behalf of Jaeban UK.

6. Because a default judgment is appropriate, BRACII will be entitled to an assessment of damages and a determination of the preclusive effect of the judgment on the counterclaims. BRACII respectfully requests that, if its Motion is granted, the Court promptly set an appropriate schedule for both of these decisions.

WHEREFORE, Plaintiffs respectfully request that the Court enter an Order (a) striking Jaeban UK's Answer and Affirmative Defenses; (b) entering a default judgment in favor of BRACII on Plaintiffs' breach of contract count against Jaeban UK; (c) promptly scheduling an assessment of damages owed by Jaeban UK to BRACII and a determination of the preclusive effect of the default judgment; and (d) granting Plaintiffs such other and further relief as the Court deems just and proper.

Although the *Poulis* factors would also justify a default against Jaeban UK (for the reasons argued in Plaintiffs' initial Motion to Strike), it is simply unable to defend itself without counsel.

Dated: July 16, 2004


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Respectfully submitted,

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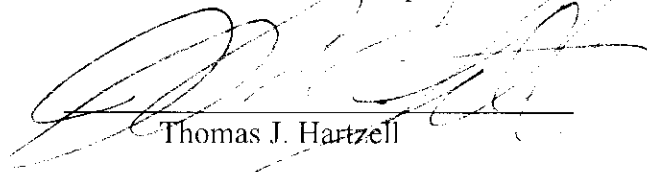
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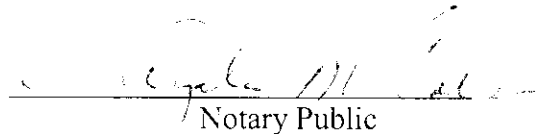
AFFIDAVIT OF SERVICE

STATE OF DELAWARE)
) SS
NEW CASTLE COUNTY)

Thomas J. Hartzell, being duly sworn according to law, deposes and says that he is employed by the law firm of Young Conaway Stargatt & Taylor, LLP, attorneys for BRACII, and that on the 16th day of July 2004, he caused a copy of the attached pleading to be served, as indicated, to those parties on the attached service list.


Thomas J. Hartzell

SWORN TO AND SUBSCRIBED before me this 16 day of July 2004.


Notary Public

¹ The Debtors are the following entities: BRAC Group, Inc., Auto Rental Systems, Inc., BGI Airport Parking, Inc., BGI Shared Services, LLC, BRAC Credit Corporation, BRAC Car Sales, Inc., BRAC Fleet Finance Corporation, BRAC Rent A Car Asia-Pacific, Inc., BRAC Rent A Car Caribe Corporation, BRAC Rent A Car Corporation, BRAC Rent-A-Car International, Inc., BRAC Rent A Car of Japan, Inc., BRAC Rent-A-Car of St. Louis, Inc., BRAC Rent-A-Car of the Midwest, Inc., BRAC Rent-A-Car Systems, Inc., BRAC Sales Corporation, BRAC Storage Corporation, BRAT Move Management, Inc., BRAT Relocation Services, Inc., BRAT TRS, Inc., BVM, Inc., Carson Chrysler Plymouth Dodge Jeep Eagle, Inc., Control Risk Corporation, Dayton Auto Lease Company, Inc., Directors Row Management Company, LLC, IN Motors VI, LLC, Mastering The Move Realty, Inc., Mosiant Car Sales, Inc., NYRAC Inc., Paul West Ford, Inc., Philips Jacobs Insurance Agency, Inc., Premier Car Rental LLC, Reservation Services, Inc., TCS Properties, LLC, Team Car Sales of Charlotte, Inc., Team Car Sales of Dayton, Inc., Team Car Sales of Philadelphia, Inc., Team Car Sales of Richmond, Inc., Team Car Sales of San Diego, Inc., Team Car Sales of Southern California, Inc., Team Fleet Services Corporation, Team Holdings Corp., Team Realty Services, Inc., The Move Shop, Inc., Transportation and Storage Associates, ValCar Rental Car Sales, Inc., Vehicle Rental Access Company, LLC, and Warren Wooten Ford, Inc.

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